UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

N FRANCISCO-OAKLAND NEWSPAPER GUILD, unincorporated association, Appellant, vs. E TRIBUNE PUBLISHING CO., corporation, Appellee.	No. 22385

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an action brought by a labor union to vacate an arbitrator's award on the grounds that the award did not draw its essence from and did not show fidelity to the collective bargaining agreement between the union and the employer. The jurisdiction of the District Court is based on §301 of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. §185, and the jurisdiction of this Court arises under 28 U.S.C. §1291, which gives this Court jurisdiction of all appeals from final decrees of District Courts of the United States.

STATEMENT OF THE CASE

The Appellant labor union, San Francisco-Oakland Newspaper Guild (hereafter referred to as the "Guild") and the Appellee, The Tribune Publishing Co., Publisher of the Oakland Tribune (hereafter referred to as the "Tribune") have been for a number of years, and are,parties to a collective bargaining agreement. A copy of the latest agreement between the parties, effective from October 16, 1965 to October 16, 1968 is attached to the complaint filed by the Guild (R. 5). The contract's Section XX, Schedule "D" (p.35 of contract) required that the Tribune grant pay increases effective October 16, 1966 of $5.00 per week or higher for all employees covered by the agreement receiving more than $160.00 per week. The Tribune denied that such increases were due to certain employees who had, prior to October 16, 1966, received salary increases to $200.00 per week by operation of the Schedule "A" top minimum provision of the agreement (p. 33 of contract). The Guild grieved,on the grounds of such failure to pay general increases, under the contract grievance procedure (Art. VI, p. 6 of the contract, R. 5), and failing settlement, the matter was taken to arbitration.

A hearing was held before Hubert Wyckoff, Esq., the arbitrator chosen by the parties, on February 6, 1967. The Guild put forth examples of actual salary histories to

illustrate the differences that existed between the parties as to the interpretation of Schedule "D" of Article XX of the Contract (p. 35, R. 5). The Tribune's spokesmen summarized the differences between the parties at the arbitration hearing in the following words [1] (p. 14 of Transcript of Hearing, transmitted to this Court as part of the Record on Appeal):

> "Mr. Landergren: Now the "Tribune" says that if on the date of October 17, 1965 or on the date of April 17, 1966, an employee has been raised to the $200 minimum and has received a total of at least $16.00, that at that point he is not entitled to any more money over the course of the agreement.
>
> The Guild disputes this position and says: 'Yes, indeed. On October 16, 1966 he is entitled to another $5.00 and on October 15, 1967 he is entitled to another $16.00.'
>
> Mr. Leff: Another $6.00.
>
> Mr. Landergren: Excuse me '...another $6.00'."

Following the hearing, briefs were submitted and on April 7, 1966, Arbitrator Wyckoff rendered his decision. The arbitration award is attached as an exhibit to the Guild's complaint and appears on pages 8 to 17 of the Record on Appeal.

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[1] A second issue between the Guild and the Tribune concerned the payment of "swingman" pay under Article XX (b) (c) and (d) of the contract (p. 33). This was also raised in the arbitration. The arbitrator ruled for the Guild on this matter and no issue is raised in the complaint or in this appeal pertaining to "swingman" pay.

The arbitrator's award ignored the issue that divided the parties (i.e. that general increases were or were not due to individuals who had been increased to $200.00 per week prior to October 16, 1966). Instead, the arbitrator compared the rate a person was earning to the minimum rates in Schedule "A" of the agreement, and if that rate was higher than $200.00, the top minimum contained in Schedule A of Article XX (p. 32 of the contract), then no general increase was to be paid (p. 6 of Award, R. 13). The comparison actually required by Article XX, Schedule "D" (p. 35 of Contract, R. 5) was between a $5.00 general increase and the increase in the minimums, with the general increase being the higher of these two.

The result of the award was to deny a general increase to all employees earning more than $200.00 per week, even though the contract provided an increase of at least $5.00 to all employees. The Guild brought this action in the District Court for the Northern District of California under §301 of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. §185, alleging that the arbitrator had exceeded his authority in his award and by reason thereof, the Tribune had breached the collective bargaining agreement. The Tribune and the Guild both moved for summary judgment, and on September 19, 1967,

the Honorable Stanley A. Weigal denied the Guild's and granted the Tribune's motion for summary judgment (R. 70). No opinion was filed by the District Court explaining its decision. On October 16, 1967 the Guild appealed to this Court, whose jurisdiction arises under 28 U.S.C. §1291.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in denying the Guild's motion for a judgment vacating the arbitrator's award on the ground that the award did not draw its essence from the collective bargaining agreement, but rather modified the agreement of the parties.

2. The District Court erred in concluding that an arbitration award which denied general increases to all employees earning over $200.00 per week did not modify a collective bargaining agreement which provided general increases of at least $5.00 per week to all employees.

ARGUMENT

I

THE COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR THE ARBITRATOR'S ON THE MERITS OF THE CASE, BUT THE COURT CAN REFUSE TO ENFORCE AN AWARD WHICH DOES NOT DRAW ITS ESSENCE FROM THE COLLECTIVE BARGAINING CONTRACT

The Guild is well aware of the Federal labor policy enunciated by the Supreme Court which leaves to an arbitrator the final say on the merits of disputes which

the parties have voluntarily taken to arbitration. But the Supreme Court has also recognized that there are limits on the arbitrator's absolute discretion. In United Steelworkers of America v. Enterprise Wheel and Car Co. (1960) 363 U.S. 593, 597, 80 S.Ct. 1358, the Court wrote:

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The Guild does not ask the Court to substitute its judgment for that of the arbitrator on the merits of this dispute. The Guild does ask the Court to review the award for its fidelity to the contract. This does not denegrate the arbitration process, it strengthens it. As the Court of Appeals for the Second Circuit said in Torrington Company v. Metal Products Workers (2nd Cir. 1966) 362 F.2d 677, 682:

> "Far from having the disruptive effect upon the finality of labor arbitration which results when courts review the 'merits' of a particular remedy devised by an arbitrator, we think that the limited review exercised here will stimulate voluntary resort to labor arbitration and thereby strengthen this important aspect of labor management relations by guaranteeing to the parties a collective bargaining agreement, that they will find in the arbitrator not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement which they negotiated."

The Guild seeks no more than this limited review.

The directive of the Supreme Court in Enterprise Wheel and Car (supra) to vacate awards which are not faithful to the contract has been followed and arbitrator's awards have been vacated in the Second Circuit (Torrington, supra), the Third Circuit (H. K. Porter Co. v. United Saw, etc. Workers (3rd Cir. 1964) 333 F.2d 596), and the Eighth Circuit (Truck Drivers & Helpers v. Ulry-Talbert Co.(8th Cir. 1964) 330 F.2d 562). This Court has not taken a contrary position. This is consistent with California law which permits an award to be vacated if the arbitrator exceeded his powers (Code of Civil Procedure, §1286.2(d), Firestone v. United Rubber Workers (1959, 168 C.A. 2d 444, 448-449, 335 P.2d 990).

II

THE ARBITRATOR'S AWARD MODIFIES THE COLLECTIVE BARGAINING CONTRACT WHICH PROVIDES A GENERAL INCREASE FOR ALL EMPLOYEES BY DENYING GENERAL INCREASES TO ALL EMPLOYEES EARNING MORE THAN $200 PER WEEK

The collective bargaining agreement between the parties (R. 5), deals with two aspects of wages: 1) minimum rates and, 2) general increases. Article XX Schedule "A" deals with minimum rates for various years of experience (p. 32-33), and Article XX, Schedule "D" deals with general

increases (p. 35-36). The dispute that went to the arbitrator concerned Article XX, Schedule "D". The issue was limited to employees with more than 6 years experience, earning more than $160.00 per week. Schedule "D" (b) (p. 35) provides:

> "Effective October 16, 1966, all employees on the payroll of the employer shall receive an increase in their weekly salary in accordance with the following schedule, or the increase provided under the schedule of minimums contained within this contract, whichever is higher.
>
> "Weekly Salary - - October 16, 1966
>
> . . . . . .
>
> $160.00 and over $5.00"

The schedule of minimums referred to in this quoted language is contained in Schedule "A". Two tables are involved, the minimum weekly wage rates for more than 5 years' experience (p. 32):

"Effective October 17, 1965	Effective October 16, 1966	Effective October 15,1967
176.25	181.25	187.25"

and the "top minimum" for more than 6 years' experience (p. 33) which required that given percentages of employees be paid a minimum of $200.00 per week.

The interaction between Schedule "D" and Schedule "A" is simply this: unless the increase in the schedule of minimums is greater than $5.00 the general increase is $5.00.

The comparison applies to the amount of increase and has no relevance to the first part of Schedule "D" (b) (p. 35):

> "Effective October 16, 1966, all employees of the employer shall receive an increase in their weekly salary..."

The amount of the increase is $5.00, unless it can be shown that the increase provided under the schedule of minimums is higher. The Guild does not claim, although it might [2/], that the increase in the minimums is greater than $5.00, so the general increase in issue is $5.00

Effective October 16, 1966, in spite of the explicit language of Schedule "D" as reviewed above, the employer failed to grant the required general increase to some employees who were increased to the "top minimum of $200.00 prior to October 16, 1966, claiming that their salary had already gone up more than $16, and this excluded them from Schedule "D" increases. This claim had no support in the language of the agreement nor was there any evidence presented at the hearing (see Transcript of the hearing) of any other agreement of the parties not contained in the contract. The Arbitrator's award made no reference to any other agreement, nor did the Arbitrator appear to rely on one in the award. He relied only on the language of the contract itself.

[2/] Although the increase in minimums for more than 5 years' experience was from $176.25 to $181.25, or exactly $5.00 (p.32), for those employees who reached the "top minimum of $200 per week, the increase in minimum was from $176.25 to $200 or $23.75 (p.33). It might be claimed that the general increase should be $23.75 because the minimum increased by this amount. The Guild does not urge this.

The language of the award in issue is found on p. 6 (R. 13) and on p. 9 (R. 16) of the award. "Second" (starting at top of page 6)is one attempt to state the situation in conflict between the parties, i.e. an employee whose salary was increased to $200.00 on April 17, 1966. "Fifth" (starting at bottom of p.8) takes another situation in which the employee's salary was increased on October 17, 1965 to $223.75. In both of these cases, the award holds, the employee will not receive his October 17, 1966 general increase of $5.00 because his rate as of October 17, 1966 is greater than $200.00.

The Guild is forced to acknowledge that if this were a possible interpretation of the contract, even if it were an interpretation that this Court or any other arbitrator would not arrive at, then arbitral finality might require its affirmance. The Guild submits that this award is not a possible interpretation of the contract and was arrived at by the arbitrator only as a result of a critical mistake in his reading of the language of Schedule "D".

III

THE ARBITRATOR'S AWARD MODIFYING THE COLLECTIVE BARGAINING CONTRACT IS BASED ON A MISTAKEN READING OF THE CONTRACT WHICH SHOWS ON THE FACE OF THE AWARD

The critical mistake in the arbitrator's award

which led to this result is revealed in this sentence (middle of p. 6, R. 13):

> "Only the 1965 annual Schedule "D" increase is applicable because this is the only Schedule "D" increase which results in a weekly rate higher than the schedule of minimums which is contained within this contract' ..."
>
> (emphasis supplied)

The arbitrator has compared the rate an employee is earning to the minimums in Schedule "A" - if his rate is higher than the schedule of minimums, then, he receives no Schedule "D" increase.

This, of course, is not what Schedule "D" provides. Schedule "D" compares the "increase" (i.e. not the rate) provided under the schedule of minimums with $5.00. If the increase under the schedule of minimums is higher than $5.00, then that higher amount applies. If not, the general increase is $5.00. Schedule "D" clearly gives the general increase to all employees. The only issue requiring reference to Schedule "A" is the amount of increase - i.e., is the increase more than $5.00 or not?

It is apparent on the face of the award that the arbitrator's decision does not draw its essence from the agreement between the parties. The arbitrator's misreading of Schedule "D" - comparing salary rates to the amount of the minimums rather than comparing $5.00

to the increase in the minimums - modifies the agreement by deleting "all" from Schedule "D" which gives the general increase to "all" employees. The role of the Court, although limited, surely extends far enough to prevent a manifest mistake in reading the language of the contract from resulting in a change in the negotiated contract. This is within the limit the Supreme Court set in Enterprise Wheel and Car (supra) where enforcement of an award is denied if the "arbitrator's words manifest an infidelity" to the collective bargaining agreement (363 U.S. at 597).

CONCLUSION

The Guild reiterates the quotation from the Torrington case set forth above (362 F.2d at 682):

> "Far from having the disruptive effect upon the finality of labor arbitration which results when courts review the "merits" of a particular remedy devised by an arbitrator, we think that the limited review exercised here will stimulate voluntary resort to labor arbitration and thereby strengthen this important aspect of labor-management relations by guaranteeing to the parties to a collective bargaining agreement that they will find in the arbitrator not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement which they negotiated."

At issue is the status of the arbitration system itself as a contributor to industrial stability. If an award, which is contrary to the explicit terms of the

collective bargaining agreement, resulting from a misreading of the agreement, is permitted to stand, the arbitration process will fall into disrepute as a means of settling disputes. This does not require the Court to substitute its own judgment on the merits. The Court need only go so far as to judge the award's fidelity to the agreement.

For the reasons given above, the Court should reverse the judgment of the District Court, vacate and refuse to enforce that part of the award that would deny to employees who are earning more than $200.00 per week the general increases provided in Article XX, Schedule "D" of $5.00 per week, effective October 15, 1966 and $6.00 per week, effective October 15, 1967.

Dated: March 28, 1968.

DARWIN, ROSENTHAL & LEFF

By 
IRWIN LEFF
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: March 28, 1968
San Francisco, California

IRWIN LEFF

STATE OF CALIFORNIA)
CITY AND COUNTY OF SAN FRANCISCO) ss

ASTRID CARTER, being first duly sworn, upon her oath deposes and says:

I am a citizen of the United States and employed in the City and County of San Francisco; I am over the age of eighteen years and not a party to the within action; my business address is 68 Post Street, San Francisco, California 94104; I served three copies of the attached APPELLANT'S OPENING BRIEF, by placing said copies in an envelope addressed to the following at his office address:

HAROLD W. JEWETT, JR., ESQ.
General Counsel,
Oakland Tribune,
P. O. Box 509
Oakland, California, 94604

which said envelope was then sealed and postage fully prepaid thereon, was deposited in the United States mail at San Francisco, California, on the date given below.

Astrid Carter

Astrid Carter

SUBSCRIBED AND SWORN TO before
me this 29th day of March, 1968

Irwin Leff

IRWIN LEFF, Notary Public
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALIFORNIA

My commission expires October 1, 1970